HIGH COURT OF ANDHRA PRADESH

* * * *

WRIT PETITION No.9321 OF 2011

Between:

Union of India, rep. by its General Manager,

South Central Railway, Secunderabad and another

.....Petitioners.

AND

S.P. Bhattacharya and another .....Respondents

DATE OF JUDGMENT PRONOUNCED: 18.08.2023

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE RAVI NATH TILHARI

&

THE HON'BLE SRI JUSTICE B.V.L.N.CHAKRAVARTHI

1. *Whether Reporters of Local newspapers may be allowed to see the Judgments?* *Yes/No*

2. *Whether the copies of judgment may be marked to Law Reporters/Journals* *Yes/No*

3. *Whether Your Lordships wish to see the fair copy of the Judgment?* *Yes/No*

RAVI NATH TILHARI, J

B.V.L.N.CHAKRAVARTHI,J

*** THE HON'BLE SRI JUSTICE RAVI NATH TILHARI**
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THE HON'BLE SRI JUSTICE B.V.L.N.CHAKRAVARTHI

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! Counsel for the Petitioner: Sri M. Srinivas,
Standing counsel for the
Central Government

^ Counsel for the 1st respondent: Sri J.M. Naidu

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> Head Note:

? Cases Referred:

[1] AIR 1998 SC 2073
[2] (1998) 8 SCC 222
[3] (2003) 3 SCC 464
[4] 1985 (3)SCR 837

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WRIT PETITION No.9321 OF 2011

JUDGMENT(per Hon'ble Sri Justice Ravi Nath Tilhari)

Heard Sri M. Srinivas, learned standing counsel for the Central Government and Sri J.M. Naidu, learned counsel for the respondent No.1.

2. This writ petition under Article 226 of the Constitution of India has been filed by the petitioners-Union of India and its authority challenging the order dated 28.12.2010, passed by the Central Administrative Tribunal (for short, "the CAT") in Original Application No.594 of 2010, by which the O.A of the 1st respondent herein S.P. Bhattacharya was allowed to the extent indicated in the order to which reference will be made shortly.

3. The 1st respondent was initially appointed as T.C. Fitter on 16.09.1969 in Railway Electrification Project. He was granted temporary status w.e.f 01.01.1984 as Cable Jointer in RE organization. His pay was revised on proforma basis vide proceedings dated 01.11.2005 (A-VI). The applicant was absorbed to the post of Rest House Watchman on 04.09.2002 and retired from service on 30.11.2005. On his retirement he

was given service certificate stating that he has completed 21 years and 11 months i.e., taken as 22 years service. The applicant came to know that the period from 01.03.1997 to 03.09.2002 has been excluded from his service as he was sick and the period has been taken on leave without pay. A representation was submitted to the authority concerned through General Secretary, NFRC, dated 06.08.2008 for counting of 50% casual labour service after attaining temporary status for pensionary benefits, which was rejected by DRM/P/BZA vide its letter dated 12.08.2008.

4. The 1st respondent filed O.A.No.594 of 2010 before the CAT to declare the action of the Divisional Railway Manager, South Central Railway, Vijayawada, Krishna District in denying pension and pensionary benefits vide proceedings dated 12.08.2008 as illegal, arbitrary and violative of Articles 14 and 16 of the Constitution of India with further prayer to direct the Union of India and Divisional Railway Manager to sanction and release all pensions along with arrears of pension and pensionary benefits with interest.

5. The petitioners herein contested the matter by filing the counter affidavit. They set up the case that the services rendered by the 1st respondent prior to 01.01.1984 shall not be

counted for pension. The Project Casual Labour shall be eligible to count only half the period of service rendered by them after attaining temporary status on completion of prescribed days of continuous employment and before regular absorption as qualifying service for the purpose of pensionary benefits. They submitted that the 1st respondent was appointed as Project Casual Labourer; was granted temporary status and 50% of service rendered as casual labour with temporary status shall be taken for the purpose of pensionary benefits. In regard to full service, the period has been taken from 04.09.2002 to 30.11.2005. They excluded the period for which the 1st respondent was absent and as a result thereof the qualifying service comes to 8 years 5 months and 9 days which is less than the minimum qualifying service of ten years for granting pension. Consequently, his case was considered and rejected by order dated 12.08.2008.

6. In regard to exclusion of the period during the absence of the 1st respondent, the stand of the petitioners was that the said period was not regularised and as per Rule 14 of the Railway Service Pension Rules, 1993 (for short, "the Rules, 1993"), the period of absence 'leave without pay' 'dies non' etc shall not be counted for qualifying service and in view of such rule position,

the total period of absence of 2,861 days was not considered as qualifying service period. Consequently, the qualifying service being only 8 years 5 months and 9 days, the 1st respondent was not entitled to get pension.

7. The 1st respondent had submitted before the Tribunal that the leave period was regularised as leave without pay, as such the leave period cannot be treated as unauthorised absence and should be added in the qualifying service for the purpose of granting of pension.

8. The Tribunal observed that the point which fell for consideration before it was as to whether the period of absence from 01.03.1993 to 01.03.1994 and from 01.03.1997 to 03.09.2002 can be excluded from service rendered by the 1st respondent towards pension.

9. The Tribunal considered and observed that from the memo dated 20.11.2005, Annexure-VI to the O.A, the period of absence was regularised as leave without pay (LWP). The Tribunal also found that it is no ones case that any disciplinary action has been taken against the 1st respondent for his absence during the above period on the charge of unauthorised absence and in view of such a position, after referring to Rule

14 of the Rules, 1993, the Tribunal held that there was no reason to treat that period, as unauthorised absence and to exclude from the services rendered by the 1st respondent for the purpose of counting the qualifying service. The Tribunal allowed the O.A with a direction to the petitioners to include the period of absence and calculating the total period of quailing service, grant pension, as also to pay the arrears within the specified period.

10. The learned counsel for the petitioners submitted that the Tribunal erred in allowing the O.A without setting aside the proceedings No.P.500/NR/317/2005 dated 12.08.2008, by which the case of the 1st respondent for pension was rejected, which was also not challenged before the Tribunal. In other words, the submission is that without making challenge to the order dated 05.08.2008, the CAT could not allow the O.A.

11. He next submitted that the period of absence in total of 2,861 days was rightly excluded from the qualifying services and excluding the same, qualifying service was only 8 years 5 months and 9 days, and being less than 10 years the 1st respondent was not eligible for pension. He further submitted that as per Rule 36 of the Rules, 1993, all leaves during the service for which leave salary is payable and all extraordinary

leave granted on medical ground shall be counted as qualifying services. He submitted that even assuming but without admitting that the respondent No.1 was granted leave without pay, the said leave without pay is not an extraordinary leave as per Rule 36 of the Rules, 1993. In his submission the Tribunal erred in holding that the period of absence was regularised as leave without pay and consequently should have been taken towards qualifying service. Thus, he submitted that the 1st respondent was not entitled for pension as per Rule 14 of the Rules, 1993.

12. The learned counsel for the petitioners further referred to the statement showing the qualifying services of the 1st respondent annexed with the writ petition as Ex.P.13 to show the calculation of the service as qualifying and non qualifying service and to submit, based thereon, that the non qualifying service after LWP/absent in 50% of casual labour service was 7 years 10 months 6 days and after excluding the same casual labour service, period came to 10 years 9 months and 26 days and 50% thereof, that after temporary status service, was calculated as 5 years 4 months 28 days. The 1st respondent regular service, temporary status was also calculated which according to his submission came to 3 years 0 months and 11

days to which, by adding 50% of temporary status service, the net qualifying service was calculated as 8 years 5 months and 9 days which was less than 10 years service for pension.

13. Learned counsel for the petitioners placed reliance in **Union of India and others vs. K.G Radhakrishana Panickar and others[1].**

14. The learned counsel for the 1st respondent submitted that as per memo dated 20.11.2005 filed by the petitioners the absence period has been regularised as LWP which shall be treated as service, as per Rule 14 of the Rules, 1993, as this Rule specifically states that only unauthorised period in continuation of authorised leave of absence treated as overstay will be excluded from counting of service towards pension. Consequently, the absence having been regularised as LWP that period could not be excluded for the purpose of calculating total service period.

15. Learned counsel for the 1st respondent submitted that Rule 36 of the Rules, 1993, is not being correctly interpreted by the petitioners' counsel. The 1st respondent put in more than 10 years of qualifying service and was eligible for grant of

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[1] AIR 1998 SC 2073

pension. Consequently the order of the CAT is perfectly legal and justified which calls for no interference.

16. Learned counsel for the 1st respondent placed reliance in **The State of Punjab and others vs. Bakshish Singh[2].**

17. We have considered the submission advanced and perused the material available on record.

18. The point for consideration is whether the order of the CAT in directing to count, the period of absence as Leave Without Pay (L.W.P) in qualifying service for pensionary benefits, is justified or it calls for interference?

19. We may first refer to Rule 36 of the Rules, 1993 which provides as under:

> "36. Counting of period spent on leave-
>
> All leave during service for which leave salary is payable and all extraordinary leave granted on medical grounds shall count as qualifying services:
>
> Provided that in the case of extraordinary leave other than extraordinary leave granted on medical certificate, the appointing authority may, at the time of granting such leave; allow the period of that leave to count as qualifying service if such leave is granted to a railway servant,

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[2] (1998) 8 SCC 222

> (Authority: Railway Board's letter No. F(E)III/99/PN 1/(Modification) dated 23.5.2000)
>
> (i) due to his inability to join or rejoin duty on account of civil commotion, or
>
> (ii) for prosecuting higher scientific or technical studies."

20. Rule 36 of the Rules, 1993 provides for counting of period spent on leave. It provides that all leave during service for which leave salary is payable and all extraordinary leave granted on medical grounds shall count as qualifying service.

21. In view of Rule 36 of the Rules, 1993, we are of the considered view that all leave during service period for which leave salary is payable shall count as qualifying service. Consequently, all leave during service period for which leave salary is not payable, cannot be counted as qualifying service.

22. The proviso to Rule 36 is not relevant for the present purpose, as it relates to the case of extraordinary leave other than extraordinary leave granted on medical certificate. It is nobody's case that the present is a case of grant of extraordinary leave. Nothing has been brought on record to show that the absence period was granted as extraordinary leave on medical certificate.

23. In the case of the 1st respondent, the absence has been treated as leave without pay. In other words, the absence during service has been treated as leave, for which leave salary is not payable. So, such period cannot be counted as qualifying service for pension in view of Rule 36.

24. Rule 14 of the Rules, 1993 is reproduced as under:

> "Rule 14: Periods which shall not be treated as service for pensionary benefits-Periods of employment in any of the following capacities shall not constitute service for pensionary benefits, namely,-
>
> (i) in a part-time capacity;
> (ii) at casual market or daily rates;
> (iii) in a non-pensionable post;
> (iv) in a post paid from contingencies except as provided in rule 31;
> (v) under a convenient or a contract which does not specifically provided for grant of pensionary benefits;
> (vi) work done on payment of a fee or honorarium;
> (vii) Apprentice period of Special Class Apprentices (Authority: Railway Board's letter No. F(E)III/99/PN 1/(Modification) dated 23.5.2000)
> (viii) removal or dismissal from service in accordance with rule 40;
> (ix) resignation from service save as indicated under rule 41;
> **(x) period of unauthorised absence in continuation of authorised leave of absence treated as overstay,**
> (xi) joining time allowed to a railway servant transferred at his own request and not in public interest for which he is not entitled to be paid;
> (xii) period of service treated as dies-non;
> (xiii) foreign service in respect of which the foreign employer or railway servant has not paid service contributed unless the payment has been specifically waived by the President;
> (xiv) on contract basis except when followed by confirmation."

25. Rule 14 (x) was relied upon by the learned counsel for the 1st respondent to contend that it is only period of unauthorised absence in continuation of authorised leave of absence treated as overstay, which shall not be treated as service for pensionary benefits and in the case of 1st respondent as there is no order treating the absence period as overstay, the period of absence treated as L.W.P cannot be excluded. He contended that the memorandum dated 20.11.2005 annexed as Ex.P.7 shows that the period from 01.03.1997 to 03.09.2022 of 2960 days as also 78 days with effect from 01.03.1993 was treated as LWP (Leave Without Pay) and not as overstay in continuation of authorised leave under Cl.(x) of Rule 14.

26. We are not convinced with the aforesaid submissions. The period of absence, treated as leave without pay, may not be covered under Rule 14(x), but the question is if such a period would be covered under Rule 36. We have already held above that, the leave for which salary is not payable, shall not be counted as qualifying service, in view of Rule 36. So, even if rule 14(x) may not attract as is the submission of the learned counsel for the 1st respondent still period of leave, for which leave salary is not payable cannot be counted in qualifying service.

27. In **Bakshish Singh** (supra), upon which the learned counsel for the 1st respondent placed reliance, the Tribunal held that the unauthorised absence from duty, was regularised by treating the period of absence as leave without pay, and consequently, the charge of misconduct did not survive. The decree passed by the trial court based on such finding, in the suit, was confirmed by the appellate court, but the appellate court remanded the matter, without setting aside specifically finding on other point. The High Court dismissed the Second Appeal summarily. The Apex Court set aside the appellate order to the extent of remand. Relying upon this judgment in **Bakshish Singh** (supra), it was submitted that the period which stands regularised, therefore, could also not be considered for the purpose of excluding for the pensionary benefits, as the same could not considered even for the penalty of dismissal.

28. The case of **Bakshish Singh** (supra) came up for consideration by the Hon'ble Apex Court in **Maan Singh vs. Union of India and others[3],** upon reference made to the three Judges Bench in view of the apparent conflict noticed between **Harihar Gopal case (1969) SLR 274 (SC) and Bakshish Singh** (supra). In **Maan Singh** (supra), the Honb'le Apex Court held

[3] (2003) 3 SCC 464

that “the decision of this court in **Bakshish Singh** (supra) is not an authority for the proposition that order terminating the employment cannot be sustained inasmuch as in the later part of the same order, the disciplinary authority also regularised unauthorised absence from duty by granting employee leave without pay. “In **Maan Singh** (supra), the Hon’ble Apex Court held that in **Bakshish Singh** (supra), the Apex Court really considered the scope of powers of remand and did not infact consider the question whether the view expressed by the 1st appellate court in affirming the order of the trial court was justified.

29. It is apt to refer para 6 of **Maan Singh** (supra) as under:

> 6. Bakshish Singh's case arose out of a suit filed by Bakshish Singh who was a police constable in Punjab but was dismissed from service on 1.6.1988 after a regular departmental enquiry on the charge of unauthorised absence from duty. This order was challenged on several grounds and the trial court decreed the suit on the basis that the order of dismissal could not have been passed by the defendants inasmuch as they themselves had regularised and treated the period of the plaintiff's absence from duty as the period of leave without pay and they could not legally say that he was guilty of misconduct for unauthorised absence from duty. Having found that it was not a case of

misconduct of the gravest kind, the lower appellate court, while upholding the findings of the trial court, remanded the case back to the disciplinary authority for passing a fresh order of punishment. Second appeal preferred before the High Court was dismissed in limine. In those circumstances, this Court noticed that "once it was found as a fact that the charge of unauthorised absence from duty did not survive, we fail to understand how the lower appellate court could remand the matter back to the punishing authority for passing a fresh order of punishment." It was further noticed that the finding of the trial court was that proper opportunity of hearing was not given and the signatures of the Bakshish Singh were obtained under duress during departmental proceedings and when that finding remained intact, there was no occasion to remand the case to the punishing authority merely for passing a fresh order of punishment. It is in these circumstances this Court ultimately passed an order as set out in para 11 of the judgment, which is as under :-

> ".it will be noticed that the trial court recorded a categorical finding of fact that a proper opportunity of hearing was not afforded to the respondent in the departmental proceedings and that his allegation that his signatures on certain papers during those proceedings were obtained under duress, was not controverted as the State of Punjab had led no evidence in defence. The trial court also recorded a finding that unauthorised absence from duty having been regularised by treating the period of absence as leave without pay, the charge of misconduct did not

survive. It was with this finding that the suit was decreed. The lower appellate court confirmed the finding that since the period of unauthorised absence from duty was regularised, the charge did not survive but it did not say a word about the finding relating to the opportunity of hearing in the departmental proceedings. Since those findings were not specifically set aside and the lower appellate court was silent about them, the same shall be treated to have been affirmed. In the face of these findings, it was not open to the lower appellate court to remand the case to the punishing authority for passing a fresh order of punishment. The High Court before which the second appeal was filed by the State of Punjab, did not advert itself to this inconsistency as it dismissed the appeal summarily, which indirectly reflects that it allowed an inconsistent judgment to pass through its scrutiny." [pp. 226, 227] Therefore, the appeal in Bakshish Singh's case was allowed**. It is only in the head note of the report that the question whether an employee could be held guilty of misconduct on the basis of unauthorised absence is set out as decided in the trial court and affirmed by the first Appellate Court and not from the judgment of this Court such a conclusion can be drawn since there is no consideration or discussion at all, much less any declaration of law is made by this Court on this aspect of the matter.** This Court in that case really considered the scope of powers of remand, made the order as set out above and did not, in fact, consider the question whether the view expressed by the first Appellate Court in affirming the order of the

> trial court was justified or not, but proceeded on the basis that on the conclusion reached by the first Appellate Court whether remand to disciplinary authority is permissible in law and recorded its findings. **Therefore, the decision of this Court in Bakshish Singh's case is not an authority for the proposition that the order terminating the employment cannot be sustained inasmuch as in the later part of the same order the disciplinary authority also regularised unauthorised absence from duty by granting an employee leave without pay. In our view, thus, there is no conflict in this regard with the decision in Harihar Gopal's case.”**

30. Learned counsel for the 1st respondent could not show that Rule 36 of the Rules, 1993 was for consideration in **Bakshish Singh** (supra).

31. The submission based on **Bakshish Singh** (supra) also fails.

32. In **K.G. Radhakrishana Panickar** (supra) on which reliance was placed by the learned counsel for the petitioners, it was held that the Project Casual Labour could be treated as temporary w.e.f 01.01.1981 under the scheme which was accepted by the Hon’ble Apex Court in **Inder Pal Yadav and others vs. Union of India[4].** Before the acceptance of the

[4] 1985 (3)SCR 837

scheme the benefit of temporary status was not available to the Project Casual labour and on the basis of the new benefit, project casual labour became entitled to count half of the service rendered as Project Casual Labour, after being treated as temporary on the basis of the scheme as accepted.

33. We reproduce the statement as shown in Ex.P.13 to the writ petition as under, to show the period of qualifying service and the calculation made by the petitioners:

"STATEMENT SHOWING THE QUALIFYING SERVICE OF SHRI S.P. BHATTACHARYA

50% of Casual Labour Service with	D	M	Y	Regular Service Temporary Status	D	M	Y
Regular Absorption	03	09	2002	DOR	30	11	2005
Temporary status01	01	01	1984	DOA (Regular) (-)	04	09	2002
	02	08	18		26	03	03
Non-qualifying Service (LWP/Absent) (-)	06	10	07	Less: Non-qualifying service:	15	02	00
	26	09	10		11	00	03
50% of temporary Status Service	28	04	05	Add 50% of CL (Temp. Status) Service	28	04	05
				Net Qualifying service	09	05	08

34. So, the 1st respondent's Project Casual Labour service to the extent of 50%, was counted, towards qualifying service on which there is no dispute. That period or the calculation of 50% of the casual labour services, is not the subject matter in issue. Consequently, **K.G. Radhakrishana Panickar** (supra), is not attracted at this stage of the proceedings.

35. The period of qualifying service of the 1st respondent is less than ten years. He is not eligible for grant of pension.

36. In our considered view, Rule 36 of the Rules, 1993 is attracted. The CAT did not consider Rule 36 and merely considering Rule 14 (x) of the Rules, 1993, directed to include the absence/leave period, without considering that the absence period though treated as leave was leave without pay; for which leave salary was not payable and consequently it would not be counted for qualifying service.

37. In the result, the writ petition is allowed. The order dated 28.12.2010, passed by the Central Administrative Tribunal in O.A. No.594 of 2010 is quashed. No order as to costs.

Consequently, the miscellaneous petitions, if any, pending in the petition shall stand closed.

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RAVI NATH TILHARI, J

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B.V.L.N.CHAKRAVARTHI,J

Date:18.08.2023

Note:

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THE HON'BLE SRI JUSTICE RAVI NATH TILHARI

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